(5)

No. 86-1673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

JAMES D. ST. CLAIR, P.C.*
THOMAS N. O'CONNOR
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
Attorneys for Petitioner, Christopher Gregory

* Counsel of Record

July 17, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1673

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Supreme Court Rule 22.5, the Petitioner, Christopher Gregory ("Gregory"), files this brief in reply to Respondents' Brief In Opposition to Christopher Gregory's Petition for Writ of Certiorari.[1]

---

[1] The Respondents' Brief in Opposition to Christopher Gregory's Petition for Writ of Certiorari will be cited herein as "Resp. Opp. pp. ——". Gregory's Appendices, previously filed with his Petition, will be cited herein as "Pet. App. ——".

REPLY POINT I

Contrary To The Respondents' Argument, The Conflict Between The Circuit Courts Of Appeals Is Clear And Substantial And Warrants Resolution By This Court

The respondents argue there is no conflict between the Fifth Circuit Court of Appeals' decision in this case and several recent decisions issued by the Tenth and Seventh Circuit Courts of Appeals because in all cases the federal courts merely apply the preclusion doctrines of the applicable state. (Resp. Opp. pp. 24-25). The respondents' contention is erroneous.

As the Tenth Circuit recently confirmed, its preclusion analysis does not end merely with a determination of whether a subsequent claim under 42 U.S.C. § 1983 is barred by a state's preclusion rules:

> Even when the requirements of claim preclusion discussed above are satisfied, we will still inquire whether plaintiffs have had a full and fair opportunity to litigate their claims before a court with the authority to adjudicate the merits of those claims. *See, e.g., Scroggins v. Kansas*, 802 F.2d 1289, 1291 (10th Cir. 1986); *cf. Thournir v. Meyer*, 803 F.2d 1093, 1094-95 (10th Cir. 1986).

Carter v. Emporia, 815 F.2d 617, 621 (10th Cir. 1987). The Seventh Circuit likewise has held that proper analysis requires more than the mere application of state preclusion rules, and includes the additional, federally-imposed requirement that a plaintiff have had "a full and fair opportunity to litigate his claims" in the prior state court action. *Jones v. City of Alton*, 757 F.2d 878, 884 (7th Cir. 1985).

By contrast, the Fifth Circuit's analysis in this case went no further than a straight application of Texas preclusion rules. (*See* Pet. App. A, pp. 8c-10a). The Fifth Circuit did not independently consider whether Gregory had a full and fair opportunity to litigate his

claims in the Texas state courts. Had the Fifth Circuit done so, and followed the analysis employed by the Tenth and Seventh Circuits, Gregory's federal claims under § 1983 would not have been barred by state preclusion rules and 28 U.S.C. § 1738. *See, e.g., Scroggins v. Kansas*, 802 F.2d 1289, 1291 (10th Cir. 1986).

Moreover, the Seventh Court recently held in *Bailey v. Andrews*, 811 F.2d 366, 370 (7th Cir. 1987) that state preclusion rules are inapplicable where, as here, the § 1983 plaintiff is challenging the integrity of a prior state court ruling or the evidence on which it is based. *See also Rhoades v. Penfold*, 694 F.2d 1043, 1047 (5th Cir. 1983) (plaintiff's complaint challenging the integrity of the underlying state court judgment as constitutionally defective under the Due Process Clause held to state a claim under § 1983 and *not* barred by res judicata). The Fifth Circuit never addressed this separate issue and never cited or discussed the *Rhoades* case in its decision.

Gregory vigorously argued before the District Court and the Fifth Circuit that the Texas consent judgment is not entitled to preclusive effect because it lacks integrity as a result of the unlawful method and manner by which it was procured by the respondents. If the Fifth Circuit had applied the rule and analysis in *Bailey* to the facts of this case, it should have held Texas preclusion rules inapplicable and permitted Gregory to proceed to trial on his § 1983 claims. Moreover, the holding in *Bailey* is consistent with this Court's decision in *Tower v. Glover*, 467 U.S. 914 (1984), an important case completely ignored both by the respondents in their opposition and by the Fifth Circuit in its opinion.

Thus, contrary to the respondents' contention that the decisions of the Tenth and Seventh Circuits may be disregarded as "clearly distinguishable" from the Fifth Circuit's decision in this case (Resp. Opp. p. 25), there exists a real and substantial conflict between the Federal Courts of Appeals with respect to the proper legal stand-

ards and analyses to be employed by the federal courts in their respective applications of state preclusion doctrines in a § 1983 case. Gregory's Petition should therefore be granted and this Court should resolve this significant conflict by pronouncing uniform legal standards and methods of analysis where prior state court judgments are raised as potential bars to subsequent federal suits brought under 42 U.S.C. § 1983.

REPLY POINT II

The Proceeding On September 21, 1979 Was A Hearing, Not A Trial As Asserted By The Respondents

The respondents blithely assert on numerous occasions in their opposition that the proceeding held by the Texas District Court on September 21, 1979, was a "trial." (Resp. Opp. pp. 11, 12, 19, 20, 21, 22). The respondents cite no support for this contention and none exists. In fact and in law, the September 21, 1979, proceeding was nothing more than a hearing on a motion. It was not in any sense a "trial."

Texas law makes a very clear distinction between trials and hearings. For example, Tex. R. Civ. P. 21, which specifically governs motions, expressly distinguishes between hearings and trials. Moreover, Tex. R. Civ. P. 248 specifically provides that hearings on motions should be held *before* trial. Trials, by contrast, are governed by Tex. R. Civ. P. 245-248. Those rules provide, *inter alia*, for trial assignments on at least ten (10) days notice (Rule 245), setting cases for trial on official records kept by the clerks of the courts (Rules 246, 247), and formal designations of trial dates (Rules 247, 248).

It is undisputed that the pleading filed by the Texas Attorney General on July 24, 1979, was a "*Motion* for Entry of Final Judgment". Hearings on that motion were scheduled for August 6, August 10, August 31 and finally September 21, 1979. No notice of trial was sent

by the Texas court; no trial date was ever set; and the case was never called for trial. (Pet. App. I, p. 80a).

Thus, the proceeding on September 21, 1979, was simply a hearing on the Attorney General's motion. Gregory never received a trial then or at any time in the Texas state courts; in fact, he has never received a trial at any time in any court. The respondents' unsupported assertion to the contrary is simply wrong.

REPLY POINT III

Gregory's Jury Demand Was Timely Under Texas Law

The respondents make the additional unsupported assertion that Gregory's jury demand was untimely under Texas law (Resp. Opp. pp. 11, 20). This contention also is erroneous as a matter of law.

Tex. R. Civ. P. 216 provides that a jury demand is timely if made ". . . a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance." Because no trial date had been set by the Texas state court, Gregory's jury demand was timely under Rule 216. Thus, Gregory was entitled under Texas law to a jury trial at least on the issue of his lack of consent to the alleged "settlement." *See, e.g., Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951). Moreover, Gregory never waived his right to a jury trial, as the respondents contend. (Resp. Opp. p. 20). His counsel repeatedly objected to the Texas District Court receiving oral testimony and other evidence precisely because Gregory had demanded a trial by jury. (Pet. App. I, p. 80a, ¶5). *See Coleman v. Sadler*, 608 S.W.2d 344 (Tex. Civ. App.—Amarillo 1980) (no waiver where attorney objects to the court proceeding without a jury).

Gregory properly demanded, and was clearly entitled to, a jury trial under Texas law. Accordingly, no pre-

clusive effect should be given to the prior Texas state courts' rulings because Gregory's challenge to the consent judgment should have been decided by a jury, not a court. *See Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 353-357 (7th Cir. 1987) (findings of fact and conclusions of law by District Court after a bench trial not entitled to preclusive effect where the District Court erroneously denied plaintiff his right to trial by jury on his claims under 42 U.S.C. § 1981). Under the unique facts of this case, neither 28 U.S.C. § 1738, nor Texas preclusion rules, require that Gregory be denied his day in court before a jury of his peers. Gregory should be afforded at least one full and fair opportunity to litigate his claims and prove to a jury that the respondents' unlawful conduct violated 42 U.S.C. § 1983.

CONCLUSION

For the reasons discussed above, and those in Gregory's original Petition, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

JAMES D. ST. CLAIR, P.C.*
THOMAS N. O'CONNOR
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
Attorneys for Petitioner, Christopher Gregory

* Counsel of Record

July 17, 1987

APPENDIX

TEXAS RULES OF CIVIL PROCEDURE CITED IN REPLY BRIEF

1. Tex. R. Civ. P. 21 provides:

Rule 21—Motions

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

2. Tex. R. Civ. P. 216 provides:

Rule 216—Fee

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county courts, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

3. Tex. R. Civ. P. 245 provides:

Rule 245—Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ten days to the par-

ties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

4. Tex. R. Civ. P. 246 provides:

Rule 246—Clerk to Give Notice of Settings

The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

5. Tex. R. Civ. P. 247 provides:

Rule 247—Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

6. Tex. R. Civ. P. 248 provides:

Rule 248—Jury Cases

When a jury has been demanded, questions of law, motions, exceptions to pleadings, etc. shall, as far as practicable, be heard and determined by the court before the day designated for the trial, and jurors shall be summoned to appear in the day so designated.